



Case Summaries May 17, 2024

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DECIDED CASES

RES JUDICATA

Judicial Estoppel

Fleming v. Wilson, ___ S.W.3d ___, 2024 WL ___ (Tex. May 17, 2024) [[22-0166](#)]

The issue in this case is whether judicial estoppel bars a defendant from invoking defensive collateral estoppel because of inconsistent representations made in prior litigation.

George Fleming and his law firm represented thousands of plaintiffs in securing a products-liability settlement. Many of Fleming's clients then sued him for improperly deducting costs from their settlements. Some of those former clients sought to bring a class action in federal court, but Fleming persuaded the district court to deny class certification by arguing that issues of fact and law among class members meant that aggregate litigation was improper.

Later, in state court, Fleming prevailed in a bellwether trial involving ten plaintiffs. He then moved for summary judgment, contending that his trial win collaterally estopped the remaining plaintiffs from litigating the same issues. The trial court agreed and dismissed the remaining plaintiffs' claims with prejudice. The court of appeals reversed, holding that Fleming failed to establish that the remaining plaintiffs were in privity with the bellwether plaintiffs such that they were bound by the verdict.

The Supreme Court affirmed. It held that the doctrine of judicial estoppel bars Fleming from arguing that the plaintiffs' claims are identical. When a party successfully convinces a court of a position in one proceeding and wins relief on the basis of that representation, judicial estoppel bars that party from asserting a contradictory position in a later proceeding. Because Fleming secured denial of class certification on the ground that the plaintiffs' claims are not identical, he is estopped from arguing that their claims *are* identical, which is essential to his effort to bind all plaintiffs to the bellwether trial's result.

CONSTITUTIONAL LAW

Takings

Tex. Dep't of Transp. v. Self, ___ S.W.3d ___, 2024 WL ___ (Tex. May 17, 2024) [[22-0585](#)]

The issues in this case are whether a subcontractor's employees were TxDOT's "employees" under the Texas Tort Claims Act and whether TxDOT acted with the required intent to support an inverse condemnation claim when it destroyed the Selfs' property.

As part of a highway maintenance project, TxDOT contracted with a private company to remove brush and trees from its right-of-way easement on a tract of land owned by the Selfs. That company further subcontracted Lyellco, which ultimately removed 28 trees that were wholly or partially outside the State's right of way. The Selfs sued TxDOT for negligence and inverse condemnation. TxDOT filed a plea to the jurisdiction, and the parties disputed whether (1) Lyellco's employees were TxDOT's "employees" under the Act; (2) TxDOT employees exercised such control that they "operated" or "used" the equipment to remove the trees under the Act; and (3) TxDOT intentionally removed the trees, given its mistaken belief that the trees were inside the right-of-way. The trial court denied TxDOT's plea to the jurisdiction. The court of appeals affirmed in part and reversed in part. Both parties filed petitions for review.

The Supreme Court reversed the court of appeals' judgment, rendered judgment dismissing the negligence cause of action, and remanded the cause of action for inverse condemnation to the trial court for further proceedings. Regarding negligence, the Court held immunity was not waived because the Selfs had not shown either that the subcontractor's employees were in TxDOT's "paid service" or that TxDOT employees "operated" or "used" the motor-driven equipment that cut down the trees. Regarding inverse condemnation, the Court held the Selfs had alleged and offered evidence that TxDOT intentionally directed the destruction of the trees, which was sufficient to support the inverse condemnation claim. The Court rejected TxDOT's argument that its mistaken belief that the trees were in the right-of-way negated its intentional acts in directing the subcontractors to destroy the trees.

REAL PROPERTY

Landlord Tenant

Westwood Motorcars, LLC v. Virtuolotry, LLC, ___ S.W.3d ___, 2024 WL ___ (Tex. May 17, 2024) [[22-0846](#)]

The issue in this case is what effect, if any, an agreed judgment awarding possession to a landlord in an eviction suit has on a related suit in district court by a tenant for damages.

Virtuolotry leased property to Westwood, an automobile dealer. When Westwood sought an extension under the lease, Virtuolotry rejected the attempt and asserted that Westwood had defaulted. Westwood sued in district court for a declaration of its right to extend the lease. When the current lease term expired, Virtuolotry initiated and prevailed in an eviction suit in justice court. Westwood appealed the eviction-suit judgment to county court, but the parties ultimately entered an agreed judgment awarding Virtuolotry possession of the premises. Westwood then added claims for breach of contract and constructive eviction to its district-court suit. After a jury trial, the district court awarded Westwood over \$1 million in damages. But the court of appeals reversed and rendered a take-nothing judgment because Westwood had agreed to the eviction-suit judgment awarding possession to Virtuolotry.

The Supreme Court reversed. The Court first explained that eviction suits provide summary proceedings for which the sole issue adjudicated is immediate possession. Accordingly, agreeing to an eviction-suit judgment does not concede an ultimate right to possession or abandon separate claims for damages, even if those claims also implicate the right to possession. The Court also rejected Virtuolotry's argument that Westwood's agreement to the judgment conclusively established that it voluntarily abandoned the premises, extinguishing any claims for damages. The Court explained that a key dispute at trial was whether Westwood left voluntarily, and it concluded that legally sufficient evidence supported a finding that neither Westwood's departure nor its agreement to entry of the eviction-suit judgment was voluntary. The Court remanded the case to the court of appeals to consider several unaddressed issues.

OIL AND GAS

Assignments

Occidental Permian, Ltd. v. Citation 2002 Inv. LLC, ___ S.W.3d ___, 2024 WL ___ (Tex. May 17, 2024) [[23-0037](#)]

The issue in this case is whether an assignment of mineral interests that conveys leasehold estates is limited by depth notations in an exhibit describing property found within the leases.

In 1987, Shell Western E&P, Inc. assigned to Citation "all" of its oil-and-gas property interests described in an incorporated exhibit. The exhibit contains columns listing (1) an overarching leasehold mineral estate, (2) tracts within that lease (some with depth specifications), and (3) third-party interests that encumber those leases. In 1997, Shell purported to transfer to Occidental's predecessor some of the same oil-and-gas interests contained in the 1987 Assignment. Litigation ensued.

Occidental contends that Shell in 1987 had reserved to itself portions of the described leases beyond the depth notations and that the reserved interests were conveyed to Occidental in 1997. As a result, Occidental and Citation dispute ownership of the "deep rights" to the property. The trial court granted summary judgment for Occidental, concluding that the 1987 assignment was a limited-depth grant that did not convey Shell's deep rights to Citation. The court of appeals reversed, holding that the assignment of "all right and title" to the leases is not limited by the exhibit's information about those leases, leaving Citation and its transferee as the owners of the interests in their entirety.

The Supreme Court affirmed the court of appeals' judgment. The Court first observed that the exhibit presents ambiguities because the property interests listed in it overlap, and the exhibit contains no language directing the proper method for reading its tables. The Court then turned to the assignment's three granting clauses. The first and third clauses grant all of Shell's rights and interests in the "leasehold estates" or "leases" described in the exhibit. The second clause, which grants Shell's rights in "contracts or agreements," contains language acknowledging that those contracts may be depth limited. This differentiation between the grant of leases and the grant of contract rights and burdens solidifies a reading that the exhibit column listing Shell's leases is not narrowed by the columns referring to contracts or agreements that contain depth limitations. The Court thus held that the 1987 assignment unambiguously transferred Shell's entire leasehold interests without reservation.

CLASS ACTIONS

Class Certification

Frisco Med. Ctr., L.L.P. v. Chestnut, ___ S.W.3d ___, 2024 WL ___ (Tex. May 17, 2024) (per curiam) [[23-0039](#)]

The issue is whether emergency-room patients who were allegedly charged an undisclosed evaluation and management fee after receiving treatment were appropriately certified as a class under Texas Rule of Civil Procedure 42.

Baylor Medical Center at Frisco and Texas Regional Medical Center at Sunnyvale charge ER patients an evaluation and management services fee. Paula Chestnut and Wendy Bolen allege that they were charged the fee without receiving notice prior to treatment. They sued the hospitals on behalf of themselves and all others similarly situated, seeking class certification under Rule 42 to bring claims under the Texas Deceptive Trade Practices Consumer Protection Act and the Texas Uniform Declaratory Judgments Act. The trial court ordered class certification, concluding that the Rule 42(a) and (b) requirements were met. It further ordered certification of a Rule 42(d)(1) issue class with respect to four discrete issues.

The hospitals appealed, arguing that the class does not satisfy any of Rule 42(b)'s requirements. The court of appeals agreed that the Rule 42(b) requirements are not met by the class's claims as a whole, but it nonetheless preserved the "Rule 42(d)(1) certification of a Rule 42(b)(2) class action as to . . . three discrete issues" and decertified the class as to every other claim and issue. The hospitals filed a petition for review.

The Supreme Court reversed the part of the court of appeals' judgment that preserved a class certified on discrete issues under Rule 42(d)(1) and remanded the case to the trial court for further proceedings. The Court's precedent mandates that Rule 42(d) cannot be used to manufacture compliance with the certification prerequisites. Instead, Rule 42(d) is a housekeeping rule that functions as a case-management tool that allows a trial court to break down class actions that already meet the requirements of Rule 42(a) and (b) into discrete issue classes for ease of litigation. Once the court of appeals determined that Rule 42(b)'s criteria were not met by the claims as a whole, it should have decertified the class.

OIL AND GAS

Royalty Payments

Carl v. Hilcorp Energy Co., ___ S.W.3d ___, 2024 WL ___ (Tex. May 17, 2024) [[24-0036](#)]

In this case, the Court addressed certified questions from the Fifth Circuit.

The plaintiffs Carl and White filed a class action on behalf of holders of royalty interests in leases operated by defendant Hilcorp. The leases state that Hilcorp must pay as royalties "on gas . . . produced from said land and sold or used off the premises . . . the market value at the well of one-eighth of the gas so sold or used." Hilcorp also "shall have free use of . . . gas . . . for all operations hereunder." The parties dispute whether Hilcorp owes royalties on gas used off-lease for post-production activities. The district court ruled in favor of Hilcorp on a motion to dismiss.

On appeal, the Fifth Circuit sought guidance from the Texas Supreme Court as to the effect of *BlueStone Natural Resources, II, LLC v. Randle*, 620 S.W.3d 380, 386 (Tex. 2021), on the issues presented. *Randle* has a discussion of a free-use clause, but the Fifth Circuit noted a lack of Texas authority analyzing *Randle* when construing value-at-the-well leases. It certified two questions to the Texas Supreme Court:

(1) After *Randle*, can a market-value-at-the well lease containing an off-lease-

use-of-gas clause and free-on-lease-use clause be interpreted to allow for the deduction of gas used off lease in the post-production process?

(2) If such gas can be deducted, does the deduction influence the value per unit of gas, the units of gas on which royalties must be paid, or both?

The Court answered the first question yes. It reasoned that under longstanding caselaw, gas used for post-production activities should be treated like other post-production costs where the royalty is based on the market value at the well. *Randle* involved a gross-proceeds royalty and its discussion of a free-use clause had no bearing on the outcome of this dispute.

As to the second question, the Court noted that the parties did not fully engage on this issue, but the Court's rough mathematical calculations indicated that either of the accounting methods referenced in the second question would yield the same royalty payment. The Court did not state a preference for any particular method of royalty accounting.